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2 **BOARD OF PERSONNEL APPEALS**
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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NOS. 1-2004 & 2-2004:

AMERICAN FEDERATION OF STATE, COUNTY AND)
MUNICIPAL EMPLOYEES, MONTANA COUNCIL)
NO. 9 & LOCAL 2943, AFL-CIO,)

Complainant

- vs -

CITY OF WHITEFISH,

Defendant.

FINAL ORDER

The above-captioned matter came before the Board of Personnel Appeals (Board) on December 11, 2003. The matter was before the Board for consideration of the Exceptions filed by John M. Phelps, Office of Whitefish City Attorney, to the Investigative Report and Recommended Order issued by Mike Furlong, Investigator, dated September 9, 2003.

John M. Phelps, attorney for the Defendant, and Matthew B. Thiel, attorney for the Complainant, appeared in person.

1. IT IS HEREBY ORDERED that the Exceptions to the Investigative Report and Recommended Order are hereby dismissed.

2. IT IS FURTHER ORDERED the Investigative Report and Recommended Order is affirmed.

DATED this 15~~th~~ day of December, 2003.

BOARD OF PERSONNEL APPEALS

By: 
Jack Holstrom
Presiding Officer

Board members Holstrom, O'Neill and Schneider concur.
Board member Johnson abstained.

NOTICE: You are entitled to Judicial Review of this Order. Judicial Review may be obtained by filing a petition for Judicial Review with the District Court no later than thirty (30) days from the service of this Order. Judicial Review is pursuant to the provisions of Section 2-4-701, et seq., MCA.

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify that a true and correct copy of this document was mailed to the following on the 17th day of December, 2003:

JOHN M. PHELPS
OFFICE OF CITY ATTORNEY
CITY OF WHITEFISH
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PO BOX 7337
MISSOULA MT 59807-7337

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9 STATE OF MONTANA
10 BEFORE THE BOARD OF PERSONNEL APPEALS
11

12 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGES NO: 1-2004 and 2-2004
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16 AMERICAN FEDERATION OF STATE, COUNTY
17 AND MUNICIPAL EMPLOYEE'S, MONTANA
18 COUNCIL NO.9 & LOCAL 2943, A.F.L.-C.I.O.
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20 INVESTIGATIVE REPORT
21 AND
22 RECOMMENDED ORDER

23 vs.

24 CITY OF WHITEFISH
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32 I. INTRODUCTION
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34 A dispute arose between the City of Whitefish, Montana (the Employer or the City) and
35 the American Federation of State, County and Municipal Employee's Affiliated with A.F.L.-CIO
36 (the Union) regarding the application, meaning and interpretation of a provision of their 2000-
37 2003 collective bargaining agreement. Both parties filed unfair labor practice charges with the
38 Montana Board of Personnel Appeals alleging a refusal to bargain in good faith in accordance
39 with Title 39, Chapter 31, MCA. Both parties denied the charge filed against them. Pursuant to
40 to Section 39-31-405 (1) MCA, Mike Furlong was assigned to investigate the alleged unfair labor
41 practices charges.
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44 On July 1, 2003, The City of Whitefish (City), filed an unfair labor practice charge with this Board
45 alleging that the American Federation of State, County and Municipal Employee's Affiliated with
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1 A.F.L.-C.I.O. (AFSCME) violation of Section 39-31-402 (2), MCA , The Union filed its response
2 to the charge on July 15, 2003 and denied any violation.

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4 On July 9, 2003, AFSCME filed a counter unfair labor practice charge (ULP 2-2004) with this
5 Board on behalf of Local 2943, Whitefish City employees alleging the City had failed to bargain in
6 good faith in violation of Section 39-31 402, (2). The City denied the charge.
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10 **II. BACKGROUND**

11 American Federation of State, County & Municipal Employees, Montana Council Local
12 No. 9 and & Local 2943 is the exclusive representative for city employee's who are
13 members of the bargaining unit.
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15 The essential dispute resulting in the complaints filed by the above parties centers
16 around the interpretation and application found in Article 20 of the Collective Bargaining
17 Agreement entered into between the above named parties on July 1, 2000. Article 20
18 provides as follows:
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24 This Agreement shall supersede all rules in conflict with it, and
25 shall remain in full force and effect from 1st day of July, 2000, until the
26 30th day of June, 2003.

27 This Agreement shall be automatically renewed unless the Union
28 notifies the Employer at least ninety (90) calendar days prior to the
29 ending date of this Agreement, and shall continue until a new agreement
30 is reached. Upon notification, both parties shall meet and exchange
31 desired modification in order for the parties to review the proposed
32 changes and negotiate on the ground rules.
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35 In March 2003, the city notified the Union by letter, that it wanted to enter into
36 negotiations regarding the terms of a Collective Bargaining Agreement for the fiscal year
37 beginning July 1, 2003. The City desired to engage in negotiations regarding the
38 employee medical health insurance package provided within the contract. Upon the
39 suggestion of the city council, the city had formed a advisory committee to review the
40 insurance package and to make recommendations that they believed would help relieve
41 budget constraints faced by the City. It was the Cities primary intention to open
42 negotiations regarding adjustments they intended to propose in the employee's insurance
43 coverage. The City recognizes that Article 20 refers only to the Union initiating
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1 negotiations. However, it contends that both parties have a mutual obligation to bargain
2 collectively in good faith pursuant to the Montana Public Employees Collective Bargaining
3 Act, Section 39-31-101, to 409,MCA., Therefore, the City has the statutory right to open
4 negotiations and exchange proposals in pursuit of reaching a new collective bargaining
5 agreement.
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12 The Union declined to engage in negotiations. Bargaining unit members were satisfied
13 with the current contract and expected the 2000-2003 collective bargaining agreement to
14 be automatically renewed pursuant to Article 20. The Union points out that since the late
15 1980's the parties collective bargaining agreements have contained virtually the same
16 language that is in Article 20 of the 2000-2003 agreement. In the past, all successive
17 contracts between the parties have always been automatically renewed unless negotiations
18 were initiated by the Union. They allege that the City's demand to open negotiations is
19 contrary to language found Article 20 and inconsistent with past bargaining practices
20 between the parties. Therefore, the City's conduct represents "bad faith bargaining".
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30 It is the City's position that the Collective Bargaining Agreement became non-existent
31 beginning July 1, 2003, when the Union refused to enter into negotiations for a new
32 contract. They argue that annual employee raises related to cost of living and longevity
33 step increases are no longer in effect after June 30, 2003 due to the absence of a
34 contract. The union alleges that it is obligatory for the City recognize the "status quo"
35 issue in regards to the continuing payment of those wage increases with the automatic
36 renewal of the contract.
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1 III. DISCUSSION

2 Acts by an employer may generate claims of rights under both the Collective Bargaining
3 Agreement and the Collective Bargaining for Public Employees Act.
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5 The focus of this dispute is the interpretation and application of Article 20 of their
6 collective bargaining agreement and whether negotiations will be limited to the proposals made
7 by the Union or whether both parties have an unlimited right to open negotiation for a new
8 contract. Both parties deny any violation of the Act. Article 16 references the parties rights
9 contained in the collective bargaining agreement which defines Grievance as follows: "a
10 grievance is defined as an alleged violation or misapplication of a specific provision of this
11 negotiated agreement." The collective bargaining agreement grievance procedure culminates in
12 final and binding arbitration. This investigation has revealed that the parties have not filed
13 grievances pursuant to the existing Collective Bargaining Agreement. In the instant case, both
14 parties allege violations of 39-31-402 (2), MCA, for failing to bargain in good faith.
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16 It is in the interest of the Board of Personnel Appeals and the grievance/arbitration
17 process contained in the CBA that conflict between that process and Board remedies be held to a
18 minimum. It is also well-established public policy that utilization of the collective bargaining
19 process and grievance procedures is the preferred forum for disputes arising under collective
20 bargaining agreements. See for instance the Steelworkers Trilogy, 80 S. Ct 1343; 80 S. Ct. 1347;
21 and 80 S. Ct. 1358.
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23 The Montana Supreme Court has approved the practice of the Board of Personnel
24 Appeals in using Federal Court and National Labor Relations Board (NLRB) precedents as
25 guidelines in interpreting the Montana Collective Bargaining for Public Employees Act, State ex
26 rel. Board of Personnel Appeals vs. District Court, 183 Montana 223 598 P.2d 1117, 103 LRRM
27 2297; Teamsters Local No. 45 vs. State ex rel. Board of Personnel Appeals, 185 Montana 272,
28 635 P.2d 185, 119 LRRM 2682; City of Great Falls v Young (Young III), 211 Montana 13, 686
29 P.2d 185, 119 LRRM 2682; and AFSCME Local No. 2390 vs. City of Billings, Montana 555 P.2d
30 507, 93 LRRM 2753.
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1 In ULP 43-81, William Converse v Anaconda Deer Lodge County and ULP 44-81 James
2 Forsman v Anaconda Deer Lodge County, August 13, 1982, the Board of Personnel Appeals
3 adopted National Labor Relations Board precedent set forth in Collyer Insulated Wire, 192 NLRB
4 387, 77 LRRM 1931, August 20, 1971 deferring certain Unfair Labor Practice proceedings to an
5 existing negotiated grievance/arbitration procedure. In so doing the Board removed a possible
6 source of conflict between the Board of Personnel Appeals and the dispute resolution mechanism
7 contained within the parties' Collective Bargaining Agreement.
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10 This case possesses the elements of both the statute and the contract. The Union claims
11 that negotiations can only be initiated by the Union as clearly set forth in Article 20 of the
12 Collective Bargaining Agreement. Thus, the City's demand for the Union to engage in
13 negotiations before a new contract can be ratified is a violation of the CBA and constitutes bad
14 faith bargaining in violation of the Act. The City argues that Unions refusal to enter into
15 negotiations constitutes a statutory violation of the Montana Public Employees Collective
16 Bargaining Act. They allege the intent of the Act is to provide an equal opportunity for all parties
17 to an agreement to be able to initiate negotiations in order to reach a new contract.
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20 In determining the disposition of this case it is useful to review the discussion in Chapter
21 18, *Accommodation of Board Action to the Arbitration Process*, found in The Developing Labor
22 Law, Patrick Hardin and John E. Higgins, Editors in Chief, Fourth Edition, BNA Publications,
23 Washington, D.C. to examine the NLRB decisions that give meaning to the issue of prearbitral
24 deferral. The following paragraph is a brief summary of the rationale being applied to this ULP
25 charge.
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28 "It is well settled that deferral under *Collyer* is appropriate when (1) the disputed issues
29 are susceptible of resolution under the grievance and arbitration procedure agreed to by the
30 parties and (2) there is no reason to believe that the use of that procedure would resolve those
31 issues in a manner incompatible with the purposes of the Act." [Hardin and Higgins, p. 1390].
32 Deferral under *Collyer* is not available to parties who are unwilling to arbitrate or are unwilling to
33 waive the procedural defense that the grievance was not timely filed. [Hardin and Higgins, p.
34 1395]. "*Collyer* emphasized that prearbitral deferral is appropriate where the underlying dispute
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1 before the Board centers on the interpretation or application of the collective bargaining contract.
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3 As the Board stated in an early *Collyer*-deferred case, 'when ... the alleged unfair labor practices
4 are ... intimately entwined with matters of contractual interpretation, it would ... effectuate the
5 policies of the act to remit the parties in the first instance to the procedures they have devised for
6 determining the meaning of their agreement.'" [Hardin and Higgins, p. 1398]. Upon a
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8 determination that a case is properly deferrable under *Collyer*, both the charged and the charging
9 party are notified ... "that Board deferral is conditioned upon the prompt submission of the dispute
10 to an arbitrator." The charged party is notified ... "that absent a prompt submission of the dispute
11 to an arbitrator, deferral will be rescinded, the case will be further processed ..., and a
12 subsequent attempt by the charged party to seek deferral will be considered belated and will be
13 opposed" "In addition, the charging party is notified that its unwillingness to submit the
14 dispute to an arbitrator will result in dismissal of its charge." [Hardin and Higgins, p. 1413].
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17 Being aware that the parties have not yet resolved their dispute through their Collective
18 Bargaining Agreement's grievance/arbitration procedure it is not now possible to inquire whether
19 resolution of this dispute through that procedure will meet the standards established in Speilburg
20 Manufacturing Company, 112 NLRB 1080, 36 LRRM 1152, June 8, 1955.
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23 IV RECOMMENDED ORDER

24 Pursuant to the principles of Collyer Insulated Wire, *supra*, and Forsman/Converse v
25 Anaconda-Deer Lodge County, *supra*, without prejudice to any party and without deciding the
26 merits of the Unfair Labor Practice Charges filed, the above-captioned matter is hereby deferred
27 to the grievance/arbitration procedure in the Collective Bargaining Agreement that exists between
28 the parties.
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31 In order to eliminate the risk of prejudice to any party, the Board of Personnel
32 Appeals retains jurisdiction over this matter for the purpose of entertaining an appropriate
33 and timely motion for further consideration upon a proper showing that either: (a) the
34 dispute has not, within a reasonable time, been resolved pursuant to the parties'
35 negotiated grievance/arbitration procedure; or (b) the grievance/arbitration proceedings
36 have not been fair and regular or have reached a result which is repugnant to the Montana
37 Collective Bargaining for Public Employees Act.
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1 DATED this 9th, day of September 2003.

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3 BOARD OF PERSONNEL APPEALS

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6 By:

7 Mike Furlong
8 Mike Furlong
9 Investigator
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14 NOTICE

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16 Exceptions to this Recommended Order may be filed within ten (10) days of service
17 thereof. If no exceptions are filed, this Recommended Order shall become the Order of the Board
18 of Personnel Appeals. Address exceptions to the Board of Personnel Appeals, PO Box 6518,
19 Helena MT 59604-6518.
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24 * * * * *
25 CERTIFICATE OF MAILING

26
27 I, Jennifer Pedron, do hereby certify that a true and correct copy of this document
28 was mailed to the following on the 10th day of September 2003.
29

30
31 TIMM TWARDOSKI
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35 JOHN M. PHELPS
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